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Plaintiff Carlos Collado

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

CARLOS COLLADO, on behalf of
himself and all others similarly situated,

Plaintiff,

v.

TOYOTA MOTOR SALES, U.S.A., INC.,
a California corporation,

Defendant.

) Case No. 2:09-cv-03087-R-RC

) **CLASS ACTION**

) **PLAINTIFF'S APPENDIX OF
RECENT AUTHORITY**

) Date: July 20, 2009

) Time: 10:00 a.m.

) Judge: Hon. Manuel L. Real

1 Plaintiffs respectfully submits the attached recent authority for the Court's and the
2 parties' reference in connection with Defendant's Motion to Dismiss. The opinion was
3 issued June 12, 2009, and is not yet available on the Lexis database.

4
5 **Case**

Exhibit

6 *Cirulli v. Hyundai Motor Company,*
7 SACV 08-0854-AG (C.D. Cal. June 12, 2009) A

8
9
10 DATED: July 6, 2009

GIRARD GIBBS LLP

11
12 By: /s/ Eric H. Gibbs

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EXHIBIT A

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8 **UNITED STATES DISTRICT COURT**
9 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**
10

11 **NICHOLAS CIRULLI, individually**
12 **and on behalf of all others similarly**
13 **situated**

14 **Plaintiff,**

15 **v.**

16 **HYUNDAI MOTOR COMPANY and**
17 **HYUNDAI MOTOR AMERICA,**

18 **Defendants.**

CASE NO. SACV 08-0854 AG (MLGx)

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANT'S
MOTION TO DISMISS PLAINTIFF'S
THIRD AMENDED COMPLAINT**

19 Before the Court is the motion to dismiss (the "Motion") Plaintiff's Third Amended
20 Complaint (the "TAC") filed by defendant Hyundai Motor America ("Defendant"). The Court
21 finds this matter appropriate for decision without oral argument. FED. R. CIV. P. 78.

22 Accordingly, the Court VACATES the hearing on this matter scheduled for June 15, 2009.

23 After considering the parties' arguments, the Court DENIES the Motion as to the first
24 claim for violation of California's Consumers Legal Remedies Act ("CLRA"), California Civil
25 Code Section 1750, *et seq.*, brought by plaintiff Nicholas Cirulli ("Plaintiff"). The Court
26 GRANTS the Motion as to all of Plaintiff's other claims.

27 Where the Court grants the Motion, it does so with leave to amend. Plaintiff may file an
28 amended complaint within 21 days of this Order, setting forth adequate allegations against

1 Defendant. The amended complaint shall be complete in and of itself, and shall not incorporate
2 by reference any prior pleading.

3
4 **BACKGROUND**

5
6 The following facts are taken from the TAC. For purposes of this Motion, the Court
7 assumes these facts to be true.

8 In 1999, Plaintiff purchased a new 1999 Hyundai Sonata from a Hyundai dealership.
9 (TAC ¶ 9.) The car had a 60-month, 60,000-mile warranty. (*Id.* ¶ 111.)

10 Eight years later in 2007, Plaintiff was driving the Sonata when, upon approaching a stop
11 sign, he momentarily lost control of his vehicle. (TAC ¶ 9.) At this time, the odometer read
12 83,412 miles. (*Id.*) Plaintiff discovered that his car “had experienced a front sub-frame failure
13 due to excessive corrosion.” (*Id.*) Hyundai refused a subsequent request for warranty coverage
14 for the cost of the sub-frame replacement, instructing Plaintiff that the damage resulting from the
15 corrosion was not covered under the warranty. (*Id.*)

16 Plaintiff seeks to allege the claims for relief, numbered as follows: (1) violation of the
17 CLRA; (2) violation of California’s Fair Advertising Law (“FAL”), California Business and
18 Professions Code Section 17500, *et seq.*; (3) violation of California’s Unfair Competition Law
19 (“UCL”), California Business and Professions Code Section 17200, *et seq.*; (4) violation of the
20 Magnuson-Moss Warranty Act (“MMWA”), 15 U.S.C. § 2301, *et seq.*; (5) breach of express
21 warranty; and (6) violation of the Warranty Adjustment Act, California Civil Code Section
22 1795.90, *et seq.*

23
24 **ANALYSIS**

25
26 A court should dismiss a complaint when its allegations fail to state a claim upon which
27 relief can be granted. FED R. CIV. P. 12(b)(6). A complaint need only include “a short and plain
28 statement of the claim showing that the pleader is entitled to relief.” FED R. CIV. P. 8(a)(2).

1 “[D]etailed factual allegations’ are not required.” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, __ (May
2 18, 2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 555 (2007)). The Court must
3 accept as true all factual allegations in the complaint and must draw all reasonable inferences
4 from those allegations, construing the complaint in the light most favorable to the plaintiff.
5 *Westlands Water Dist. v. Firebaugh Canal*, 10 F.3d 667, 670 (9th Cir. 1993).

6 But the complaint must allege “sufficient factual matter, accepted as true, to ‘state a claim
7 that is plausible on its face.’” *Iqbal*, 129 S. Ct. at __ (quoting *Twombly*, 550 U.S. at 557). “A
8 claim has facial plausibility when the pleaded factual content allows the court to draw the
9 reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 129 S. Ct. at
10 __ (citing *Twombly*, 550 U.S. at 556). A court should not accept “threadbare recitals of a cause
11 of action’s elements, supported by mere conclusory statements,” *Iqbal*, 129 S. Ct. at __, or
12 “allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable
13 inferences.” *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). Dismissal
14 without leave to amend is appropriate only when the Court is satisfied that the deficiencies of the
15 complaint could not possibly be cured by amendment. *Jackson v. Carey*, 353 F.3d 750, 758 (9th
16 Cir. 2003).

17 18 1. INCORPORATION OF PRIOR FILINGS

19
20 Preliminarily, the Court notices that in the “Memorandum of Points and Authorities in
21 Support of Defendant Hyundai Motor America, Inc.’s Motion to Dismiss Plaintiff’s Third
22 Amended Class Action Complaint” (the “Motion”) and the “Reply Memorandum of Points &
23 Authorities in Support of Defendant Hyundai Motor America, Inc.’s Motion to Dismiss
24 Plaintiff’s Third Amended Complaint” (the “Reply”), Defendant makes a habit of incorporating
25 filings related to its previous motion to dismiss the Second Amended Complaint. For example,
26 Defendant says:

- 1 • “Rather than re-brief the same arguments herein, [Defendant] refers to and
2 incorporates by reference those arguments raised in its prior briefs.” (Mot. 10:7-
3 8.)
- 4
- 5 • “As [Defendant] already briefed this issue extensively . . . , [Defendant] will not re-
6 brief the same arguments. Instead, [Defendant] refers to and incorporates by
7 reference those arguments raised in its prior briefs.” (Mot. 10:14-18.)
- 8
- 9 • “Rather than re-brief those arguments herein, HMA refers the Court to the prior
10 briefing on these issues.” (Reply 8:9-11.)
- 11

12 In fact, in the Motion alone, Defendant uses this technique at least seven times. A more
13 cynical court might view this “incorporation by reference” as a thinly-veiled attempt to make an
14 end-run around the page limits set forth in Local Rule 11-6, which says that “[n]o memorandum
15 of points and authorities . . . shall exceed 25 pages in length . . . unless permitted by order of the
16 judge.” This Court will simply note that this practice of “incorporation by reference” disregards
17 the spirit of the Local Rules and is unfair to Plaintiff. The Court orders Defendant not to use this
18 practice in the future.

19

20 **2. PLAINTIFF’S FIRST CLAIM FOR VIOLATION OF THE CLRA**

21

22 Plaintiff’s first claim successfully alleges a violation of the CLRA. The CLRA makes
23 unlawful certain “unfair methods of competition and unfair or deceptive acts or practices” used
24 in the sale of goods or services to consumers. CAL. CIV. CODE § 1770(a). Plaintiff seeks to
25 allege that Defendant violated subsections (a)(5), (9), (14), and (17) of the CLRA. Plaintiff
26 bases his CLRA claim on two theories: fraudulent misrepresentation and fraudulent omission.
27 Plaintiff’s theory of fraudulent misrepresentation fails, but Plaintiff’s theory of fraudulent
28 omission does not.

1 Plaintiff's theory of fraudulent misrepresentation fails. Plaintiff seeks to allege that
2 "Defendants uniformly promised that the Sonata was a great value because of its excellent
3 design, construction, and safety; and uniformly represented that the Sonata had layers of anti-
4 corrosion protection that helps body resist corrosion for longer body life." (TAC ¶ 80 (internal
5 quotations omitted).) But the Court has already determined that these statements represent non-
6 actionable puffery. (Jan. 20, 2009 Order 4:16-20, 5:5.) These statements cannot be the basis for
7 a CLRA claim.

8 Plaintiff's theory of fraudulent omission does not fail. Plaintiff alleges that "[d]espite its
9 early knowledge of the defective drain-hole design, Defendants [sic] uniformly concealed -- and
10 continue to conceal -- this defect from consumers" (TAC ¶ 83.) In *Falk*, the Northern
11 District of California found that concealment or a failure to disclose can constitute actionable
12 fraud under the CLRA in four situations:

13
14 (1) when the defendant is in a fiduciary relationship with the plaintiff; (2) when the
15 defendant had exclusive knowledge of material facts not known to the plaintiff; (3) when
16 the defendant actively conceals a material fact from the plaintiff; and (4) when the
17 defendant makes partial representations but also suppresses some material fact.

18
19 *Falk v. Gen. Motors Corp.*, 496 F. Supp. 1088, 1095 (N.D. Cal. 2007) (quoting *LiMandri v.*
20 *Judkins*, 52 Cal. App. 4th 326, 327 (1997)). There is no allegation of a fiduciary relationship
21 here, and the other situations require materiality. "In order for non-disclosed information to be
22 material, a plaintiff must show that had the omitted information been disclosed, one would have
23 been aware of it and behaved differently." *Falk*, 496 F. Supp. at 1095 (citing *Mirkin v.*
24 *Wasserman*, 5 Cal. 4th 1082, 1092 (1993)). Here, Plaintiff alleges that "[i]f Plaintiff and the
25 Class had known that the Sonata sub-frame had no corrosion protection and in fact, corrosion
26 was accelerated due to the inadequate number and placement of drain holes, thereby weakening
27 the structural integrity of the Sonata, Plaintiff and the Class would not have purchased their
28 Sonatas." (TAC ¶ 82.) Plaintiff alleges that if Defendant had disclosed the omitted information,

1 then Plaintiff would have been aware of the alleged defect and would have behaved differently.
2 Plaintiff successfully alleges materiality.

3 Next, the Court must determine whether Plaintiff sufficiently alleges that Defendant knew
4 or should have known of the defect at the time of sale. Defendant argues that Plaintiff “fails to
5 allege sufficient facts showing [Defendant] knew or should have known *when plaintiff*
6 *purchased his vehicle* that his Sonata was unusually vulnerable to premature oxidation and
7 corrosion, and consequently structural deterioration” (Mot. 18:25-19:2 (emphasis in
8 original) (internal quotation omitted).) The Court disagrees. Plaintiff alleges:

- 9
- 10 • “Since 1999, [Defendant] has . . . constantly tracked the National Highway Traffic
11 Safety Administration . . . database to track reports of defective Sonata sub-frames.
12 From this source, [Defendant] knew that its 1999-2004 Sonatas were experiencing
13 unusually high levels of sub-frame deterioration, steering control arm separation,
14 steering loss, and highway accidents” (TAC ¶ 39.)
 - 15
 - 16 • “Car manufacturers typically counter the problems of road material accumulation
17 and sub-frame corrosion by placing drain holes in the bottom of the sub-frame.
18 Such holes permit the migration of water, dirt, mud, and salt out of the sub-frame,
19 and encourage air circulation inside the sub-frame.” (TAC ¶ 19.)
 - 20
 - 21 • “The sub-frame [Defendant] designed, manufactured and installed in [Sonatas]
22 was designed and/or manufactured without a sufficient number of drain holes
23” (TAC ¶ 20.)
 - 24

25 These and other allegations persuade the Court that Plaintiff has sufficiently alleged that
26 Defendant knew or should have known of the defect at the time Defendant sold a car to Plaintiff.

27 Finally, the Court must determine whether Plaintiff’s CLRA claim is subject to the
28 heightened pleading standard of Federal Rule of Civil Procedure 9(b), and if so, whether

1 Plaintiff satisfies this standard. Plaintiff's CLRA claim sounds in fraud, so it is subject to Rule
2 9(b). Rule 9(b) requires a plaintiff to allege his claims with enough specificity to give a
3 defendant sufficient notice of the particular misconduct to be able to defend against the charge.
4 *Bly-Magee v. California*, 236 F.3d 1014, 1019 (9th Cir. 2001) (citation omitted). Generally, a
5 plaintiff must plead "with particularity" the time and place of the fraud, the statements made and
6 by whom made, an explanation of why or how such statements were false or misleading when
7 made, and the role of each defendant in the alleged fraud. *See, e.g., In re GlenFed, Inc. Sec.*
8 *Litig.*, 42 F.3d 1541, 1547-49 (9th Cir. 1994) (en banc); *Lancaster Cmty. Hosp. v. Antelope*
9 *Valley Hosp. Dist.*, 940 F.2d 397, 405 (9th Cir. 1991). But when an allegation rests on a claim
10 of fraudulent omission, the Rule 9(b) standard is relaxed because "a plaintiff cannot plead either
11 the specific time of [an] omission or the place, as he is not alleging an act, but a failure to act."
12 *Washington v. Baenziger*, 673 F. Supp. 1478, 1482 (N.D. Cal. 1987). Here, Plaintiff pleads his
13 CLRA claim based on fraudulent omission with sufficient particularity to satisfy Rule 9(b).

14
15 The Court DENIES the Motion as to Plaintiff's first claim for violation of the CLRA.

16
17 **3. PLAINTIFF'S SECOND CLAIM FOR VIOLATION OF THE FAL**

18
19 California's False Advertising Law prohibits any "unfair, deceptive, untrue, or misleading
20 advertising." CAL. BUS. AND PROFS. CODE § 17500. Claims brought under the FAL are
21 governed by the "reasonable consumer" test, meaning Plaintiff "must 'show that members of the
22 public are likely to be deceived.'" *Williams v. Gerber Products Co.*, 523 F.3d 934, 938 (9th Cir.
23 2008) (quoting *Freeman v. Time, Inc.*, 68 F.3d 285, 289 (9th Cir. 1995)).

24 In the Motion, Defendant argues vehemently that Plaintiff fails to state a claim for
25 violation of the FAL. In his "Response to Hyundai's Motion to Dismiss Plaintiff's Third
26 Amended Class Action Complaint" (the "Opposition"), Plaintiff provides no substantive defense
27 of this claim. (Opp'n 20:24-27.) The Court GRANTS the Motion as to Plaintiff's second claim
28 for violation of the FAL.

1
2 **4. PLAINTIFF'S THIRD CLAIM FOR VIOLATION OF THE UCL**
3

4 Plaintiff's UCL claim depends on his sixth claim for violation of the Warranty
5 Adjustment Act. Plaintiff acknowledges that if his Warranty Adjustment Act claim fails, his
6 UCL claim must also fail. (Opp'n 12:11-12.) In Section 7, the Court grants the Motion as to
7 Plaintiff's sixth claim for violation of the Warranty Adjustment Act. Thus, the Court also
8 GRANTS the Motion as to Plaintiff's UCL claim.
9

10 **5. PLAINTIFF'S FOURTH CLAIM FOR VIOLATION OF THE MMWA**
11

12 The MMWA requires the application of state warranty law, and "the failure to state a
13 claim under state law necessarily constitute[s] a failure to state a claim under [the MMWA]." *Daugherty v. Am. Honda Motor Co.*, 144 Cal. App. 4th 824, 832-33 (2006). In Section 6, the
14 Court grants the Motion as to Plaintiff's fifth claim for breach of express warranty. Thus, the
15 Court also GRANTS the Motion as to Plaintiff's fourth claim for violation of the MMWA.
16
17

18 **6. PLAINTIFF'S FIFTH CLAIM FOR BREACH OF WARRANTY**
19

20 Plaintiff stipulates to dismissal of "the portion of his express warranty claim based on
21 statements outside [Defendant's] 60-month, 60,000-mile warranty." (Opp'n 9:10-12.) Thus, the
22 Court only addresses the portion of Plaintiff's claim based on Defendant's 60-month, 60,000-
23 mile warranty.

24 Previously, in his opposition to Defendant's motion to dismiss the Second Amended
25 Complaint, Plaintiff asked the Court for leave to amend to substitute a different plaintiff.
26 Plaintiff said, "If the Court finds that failure to discover the hidden problem during the warranty
27 period warrants dismissal, Plaintiff should be given leave to amend to substitute a Plaintiff who
28 discovered and reported the corrosion to Hyundai within the warranty period." (Opp'n 20:24-

1 27.) The Court gave Plaintiff leave to amend. But Plaintiff did not substitute a different
2 Plaintiff.

3 Instead, Plaintiff reworked the complaint in an effort to address the Court's concerns.
4 Plaintiff is unsuccessful. Plaintiff fails to cure the defects the Court identified in the Second
5 Amended Complaint because Plaintiff still fails to allege that he discovered the defect within the
6 warranty period. Generally, a claim for breach of express warranty cannot succeed if it is based
7 on a latent defect discovered after the vehicle's warranty elapsed. *Clemens v. DaimlerChrysler*
8 *Corp.*, 534 F.3d 1017, 1023 (9th Cir. 2008) ("If a manufacturer determines that useful life and
9 warrants the product for a lesser period of time, we can hardly say that the warranty is implicated
10 when the item fails after the warranty period expires. The product has performed as expressly
11 warranted."). Plaintiff argues that he "specifically alleges that damage to the sub-frame occurred
12 during the warranty period, because corrosion manifests over time beginning within the warranty
13 period." (Opp'n 6:1-3.) But Plaintiff does not allege that he discovered the defect within the
14 warranty period. To find in Plaintiff's favor would be to "hold that all latent defects are covered
15 under the written warranty, whether they become apparent to the customer before or after the
16 expiration of the written warranty" *Daugherty*, 144 Cal. App. 4th at 831 (internal
17 quotation omitted). This, in turn, "would [mean that the manufacturer] would, in effect, be
18 obliged to insure that a vehicle it manufactures is defect-free for its entire life." *Id.* (internal
19 quotation omitted).

20 The Court GRANTS the Motion as to Plaintiff's fifth claim for breach of express
21 warranty.

22
23 **7. PLAINTIFF'S SIXTH CLAIM FOR VIOLATION OF THE WARRANTY**
24 **ADJUSTMENT ACT**
25

26 Plaintiff does not sufficiently allege that Defendant violated the Warranty Adjustment
27 Act. This Act applies to "adjustment programs." As defined by the Act, an "adjustment
28 program" is:

1 [A]ny program or policy that expands or extends the consumer's warranty beyond
2 its stated limit or under which a manufacturer offers to pay for all or any part of
3 the cost of repairing, or to reimburse consumers for all or any part of the cost of
4 repairing, any condition that may substantially affect vehicle durability, reliability,
5 or performance, other than service provided under a safety or emission-related
6 recall campaign. "Adjustment program" *does not include ad hoc adjustments*
7 *made by a manufacturer on a case-by-case basis.*

8
9 CAL. CIV. CODE § 1795.90 (emphasis added). Plaintiff alleges in the TAC that Defendant
10 repaired vehicles on a case-by-case basis. For example, Plaintiff alleges that Defendant
11 "reflexively denied warranty claims for [some] repairs as untimely, while quietly paying for
12 repairs for the most vocal [c]lass members *on a case-by-case basis . . .*" (TAC ¶ 4 (emphasis
13 added).) Plaintiff also alleges that Defendant "repaired or replaced *certain customers'* sub-
14 frames free of charge due to corrosion outside the warranty period, purportedly as a gesture of
15 'goodwill.'" (*Id.* ¶ 40 (emphasis added).) These allegations directly contradict Plaintiff's other
16 allegations that Defendant "provides aggrieved Sonata owners with a free replacement sub-
17 frame as part of a 'silent recall' program." (*Id.* ¶ 127.)

18 Because Plaintiff alleges that Defendant repaired vehicles on a case-by-case basis,
19 Plaintiff fails to allege adequately that Defendant has an adjustment program. The Court
20 GRANTS the Motion as to Plaintiff's sixth claim for violation of the Warranty Adjustment Act.

21 22 8. CONCLUSION

23
24 Plaintiff adequately alleges his first claim for violation of the CLRA. Plaintiff does not
25 adequately allege his second claim for violation of the FAL, third claim for violation of the
26 UCL, fourth claim for violation of the MMWA, fifth claim for breach of express warranty, or
27 sixth claim for violation of the Warranty Adjustment Act.
28


1 **DISPOSITION**

2
3 The Court DENIES the Motion as to Plaintiff's first claim for violation of the CLRA.
4 The Court GRANTS the Motion as to all of Plaintiff's other claims.

5 Where the Court grants the Motion, it does so with leave to amend. Plaintiff may file an
6 amended complaint within 21 days of this Order, setting forth adequate allegations against
7 Defendant. The amended complaint shall be complete in and of itself, and shall not incorporate
8 by reference any prior pleading.
9

10
11 IT IS SO ORDERED.

12 DATED: June 12, 2009

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15 Andrew J. Guilford
16 United States District Judge
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